SELECTED GUIDELINE APPLICATION DECISIONS FOR THE ELEVENTH CIRCUIT JANUARY 1995-AUGUST 1998

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Pamela G. Montgomery
Pamela O. Barron
Jeanne G. Chutuape
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CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

Definition of "Dangerous Weapon"

United States v. Adams, 74 F.3d 1093 (11th Cir. 1996). The district court erred in refusing to apply USSG §2S1.1 to defendants' convictions under 18 U.S.C. § 1956. Given the proposition that "a district court cannot use the post-trial sentencing process to call the jury's verdict into question," a district court may not refuse to consider convictions listed in the PSR. In this case, the district court did not apply the section 1956 convictions, reducing the defendant's base offense level by ten levels in this case. The appellate court reviewed the choice of base offense level and the issue of whether the district court had authority to make a downward departure de novo. The appellate court held that the jury found the defendants guilty of violating section 1956, and guideline 2S1.1 must be applied. It rejected the district court's rationale that the gravamen of the defendants' unlawful conduct was fraud and misapplication of RTC funds, holding that "Congress intended to criminalize a broad array of money laundering activity, and included within this broad array is the activity committed" by the defendants. However, the appellate court remanded for further findings with respect to the district court's second justification that the sentence reflected a downward departure under §5K2.11. The appellate court noted that the First and Eighth circuits have rejected downward departures in similar situations. *See* United States v. Pierro, 32 F.3d 611, 620 (1st Cir. 1994), *cert. denied*, 513 U.S. 1119 (1995); United States v. Morris, 18 F.3d 562, 569 (8th Cir. 1994). On remand, the district court must identify how or why the defendants' conduct "caused or threatened less harm than typical money laundering."

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Cannon, 41 F.3d 1462 (11th Cir.), *cert. denied*, 516 U.S. 823 (1995). The Eleventh Circuit Court held that acquitted conduct may be considered by a sentencing court in determining a defendant's sentence because "a verdict of acquittal demonstrates a lack of proof sufficient to meet a beyond-a-reasonable-doubt standard"—a standard of proof higher than the preponderance of the evidence standard required for consideration of relevant conduct at sentencing.

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. Brown, 104 F.3d 1254 (11th Cir. 1997). In a case of first impression in the Eleventh Circuit, the circuit court held that, in declining to apply retroactively an amendment to sentencing guidelines that would have lowered a defendant's offense level for drug-related

convictions, a federal district court was not required to present particularized findings on each individual factor listed in the statute governing resentencing. The court clearly considered those factors and set forth adequate reasons for refusing to reduce the sentence, including findings that the defendant's involvement in a crack cocaine conspiracy was significant, that he had lacked a legitimate job for nearly two years as he participated in the conspiracy, and that he failed to show remorse or acceptance of responsibility.

United States v. Logal, 106 F.3d 1547 (11th Cir.), *cert. denied*, 118 S. Ct. 376 (1997). The district court did not violate the Ex Post Facto Clause by looking to a United States Sentencing Guideline amendment, adopted after the completion of defendant's offense, for guidance in determining the extent of his upward sentencing departure. The circuit court joined the majority of circuits in holding that the judge may consider guideline amendments that post-date the applicable guidelines in determining the degree of departure, provided that he considered the appropriate guideline in setting the base offense level. *See* United States v. Harotunian, 920 F.2d 1040, 1046 (1st Cir. 1990) (approving use of amended guideline to guide upward departure); United States v. Rodriguez, 968 F.2d 130, 140 (2d Cir.), *cert. denied*, 506 U.S. 847 (1992); United States v. Bachynsky, 949 F.2d 722, 734 (5th Cir. 1991), *cert. denied*, 506 U.S. 847 (1992); United States v. Boula, 997 F.2d 263, 267 (7th Cir. 1993); United States v. Saffeels, 39 F.3d 833, 838 (8th Cir. 1994); United States v. Tisdale, 7 F.3d 957, 967 (10th Cir. 1993), *cert. denied*, 510 U.S. 1169 (1994). *But see* United States v. Canon, 66 F.3d 1073, 1080 (9th Cir. 1995) (holding that the district court erred in referring to amended guideline to determine reasonable amount of upward departure).

United States v. Vazquez, 53 F.3d 1216 (11th Cir. 1995). The circuit court remanded the case for the district court to consider whether a reduction in the defendant's sentence is warranted. The defendant was convicted of structuring financial transactions and conspiracy to structure financial transactions. On appeal, the defendant argued that he was eligible to be resentenced according to the amended version of USSG §2S1.3 which provides a lesser base offense level. In determining whether to apply the retroactive amendment, the court joined the holdings of the First, Third, Eighth and Ninth Circuits that the district court, not the appellate court, should be the initial forum to exercise the discretion concerning whether or not an adjustment is warranted in light of an ameliorative amendment. *See* United States v. Marcello, 13 F.3d 752, 756-58, 761 (3d Cir. 1994); United States v. Coohey, 11 F.3d 97, 101 (8th Cir. 1993); United States v. Wales, 977 F.2d 1323, 1327-28 (9th Cir. 1992); United States v. Connell, 960 F.2d 191, 197 (1st Cir. 1992). The circuit court noted the First Circuit's ruling that USSG §1B1.10(a) does not mandate the use of the lesser enhancement, but merely affords the sentencing court the discretion to utilize it. Connell, 960 F.2d at 197. In deciding this issue, the Eleventh Circuit declined to follow the Fifth Circuit's approach in United States v. Park, 951 F.2d 634, 635-56 (5th Cir. 1992), wherein the appellate court determined that the amendment should be applied retroactively and remanded the case to the district court to resentence the defendant accordingly.

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Bailey, 123 F.3d 1381 (11th Cir. 1997). The district court erred in sentencing the defendant under the Guidelines Manual in effect at the time he committed the majority

of his crimes. Bailey had fair notice that continuing his crimes in operating his firearms business subjected him to the amended sentencing guidelines in effect when he committed the last of the crimes for which he was convicted. The circuit court remanded for resentencing under the version of Guidelines Manual in effect when defendant committed last crime for which he was convicted.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A6.1 Threatening Communications

United States v. Barbour, 70 F.3d 580 (11th Cir. 1995), *cert. denied*, 517 U.S. 1147 (1996). In deciding an issue upon which the circuits disagree, the Eleventh Circuit held that the district court did not err in enhancing the defendant's sentence under USSG §2A6.1(b)(1) for "pre-threat conduct." Section 2A6.1(b)(1) requires a six-level enhancement "[i]f the offense involved any conduct evidencing an intent to carry out the threatening communication." The defendant was convicted of threatening the President of the United States based on statements he made to neighbors expressing his desire to kill the President. The defendant's sentence was enhanced under §2A6.1(b)(1) based on a week long trip he took to Washington, D.C., ten days before his conversation with his neighbor, during which he went to the mall everyday with the intent to shoot the President while the President was jogging. The defendant contended that an enhancement for this conduct was improper because the conduct occurred before the threatening communication was made. The circuit court joined the Fourth and Ninth Circuits in holding that pre-threat conduct may be used to support an enhancement under §2A6.1(b)(1). *See* United States v. Gary, 18 F.3d 1123, 1128 (4th Cir.), *cert. denied*, 115 S. Ct. 134 (1994); United States v. Hines, 26 F.3d 1469, 1474 (9th Cir. 1994); *but see* United States v. Hornick, 942 F.2d 105 (2d Cir. 1991), *cert. denied*, 502 U.S. 1061 (1992) (pre-threat conduct may not be basis of enhancement). The circuit court stated that as long as the actions show that the defendant has an intent to act on the threat and is likely to do so, it does not matter when that conduct occurred. The circuit court noted the Second Circuit's concern that the government may dig through the defendant's past to find an incident that is only tenuously related to the conduct at hand to find evidence of intent. The circuit court set forth three factors for the district court to consider when determining if pre-threat conduct is probative of the defendant's intent: (1) "the proximity in time between the threat and the prior conduct," (2) "the seriousness of defendant's prior conduct," and (3) "the extent to which the pre-threat conduct has progressed towards carrying out the threat." Noting that the only reason the defendant did not carry out his plan to shoot the President was the fact that the President was out of the country, the circuit court concluded that the defendant's conduct clearly evidenced an intent to carry out his threat.

United States v. Taylor, 88 F.3d 938 (11th Cir. 1996). The district court's application of a six-level enhancement for conduct evidencing an intent to carry out a threat was proper because there was a direct correlation between the pre-threat conduct and the threats for purposes of §2A6.1(b)(1). The defendant urged the appellate court to follow the Second Circuit's opinion in United States v. Hornick, 942 F.2d 105 (2d Cir. 1991), that only evidence of post-threat conduct can be considered in determining whether to apply the §2A6.1(b)(1) specific offense characteristic

enhancement. The appellate court rejected the Second Circuit's interpretation of the guideline and instead joined the Fourth, Seventh, and Ninth Circuits in holding that pre-threat conduct may be considered when applying the enhancement but only when there is a direct connection between the defendant's acts and the threat. The appellate court noted that in determining the probative value of pre-threat conduct courts may consider: (1) "the proximity in time between the threat and the prior conduct"; (2) "the seriousness of the defendant's prior conduct"; and (3)"the extent to which the pre-threat conduct has progressed toward carrying out the threat." Therefore, the essential inquiry for §2A6.1(b)(1) purposes is not related to whether the act took place before of after the threat was made but, whether the facts of the case, taken as a whole, establish a sufficiently direct connection between the defendant's pre-threat conduct and the threat.

Part B Offenses Involving Property

§2B3.1 Robbery

United States v. Dudley, 102 F.3d 1184 (11th Cir.), *cert. denied*, 117 S. Ct. 1567 (1997). On an issue of first impression, the Eleventh Circuit affirmed the district court's two-level enhancement under USSG §2B3.1(b)(1) for property taken from a financial institution after the defendant's conviction for bank robbery. The defendant argued that the enhancement was improperly duplicative because his offense level already fully accounted for the level of culpability ascribed to the crime of conviction, bank robbery. The court applied *de novo* review of sentencing guidelines issues. Citing Eighth and Ninth Circuit precedents of United States v. McNeely, 20 F.3d 886, 888 (8th Cir.), *cert. denied*, 115 S. Ct. 171 (1994) and United States v. Alexander, 48 F.3d 1477 (9th Cir.), *cert. denied*, 116 S. Ct. 210 (1995), the court held that the Commission sought to punish robbery of financial institutions and post offices more severely because those entities kept large amounts of readily available cash and were attractive targets; the defendant failed to bear the burden of demonstrating that the guideline provision was irrational.

United States v. Vincent, 121 F.3d 1451 (11th Cir. 1997). The district court did not err in applying a three-level enhancement for possession of a dangerous weapon during a robbery, pursuant to §2B3.1(b)(2)(E), even though the victim could not see the weapon. The defendant placed an object against the restaurant manager’s side and demanded that she give him the money she was carrying. She did not see the object, but believed it was some type of weapon that was used to perpetrate a robbery. The defendant argued that the enhancement does not apply if the victim of a robbery does not actually see what appears to be a dangerous weapon and that a victim's “subjective thought that it was a weapon” is insufficient to support the enhancement. The court cited its earlier opinion in United States v. Shores, 966 F.2d 1383, 1386 (11th Cir.), *cert. denied*, 506 U.S. 927, 113 S. Ct. 353 (1992), that §2B3.1(b)(2)(C) applied although a toy gun possessed by the defendant during an attempted robbery at the time of his arrest was not brandished or displayed, or even shown to anyone.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996). The district court did not err in setting the appellants' base offense levels under USSG §2D1.1 based upon the total amount of marijuana seized during their arrests for conspiracy to manufacture and possess with intent to distribute marijuana plants, including amounts held for "personal use." There was no Eleventh Circuit precedent on this issue, and the appellants asserted that the district court should have followed the Ninth Circuit's decision holding that drugs possessed for personal use should not be included in determining the total drug quantity. United States v. Kipp, 10 F.3d 1463, 1465-66 (9th Cir. 1993). The Eleventh Circuit declined to follow the reasoning of the Ninth Circuit, and affirmed the district court's decision to join the majority of circuits in holding that where evidence showed the defendant was involved in a conspiracy to distribute drugs, the "defendant's purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy." United States v. Innamorati, 996 F.2d 456, 492 (1st Cir.), *cert, denied*, 510 U.S. 955 (1993); *see also* United States v. Snook, 60 F.3d 394, 395 (7th Cir. 1995); United States v. Fregoso, 60 F.3d 1314, 1328 (8th Cir.); United States v. Wood, 57 F.3d 913, 920 (10th Cir. 1995). The circuit court held that the marijuana intended for personal use by Antonetti and Fink was properly included by the district court in determining their base offense levels.

United States v. Eggersdorf, 126 F.3d 1318 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1204 (1998). The district court did not err in denying the defendant's motion to reduce his sentence below the mandatory minimum. The circuit court held that the statute plainly stating that the five-year mandatory minimum sentence applied in cases involving 100 or more marijuana plants, regardless of weight, controlled over the amendment to the sentencing guideline to provide that each marijuana plant would be equivalent of 100 grams, instead of one kilogram, of marijuana.

United States v. Hall, 46 F.3d 62 (11th Cir. 1995). The district court did not err in enhancing the defendant's sentence pursuant to USSG §2D1.1(b)(1) for his possession of a firearm. The defendant argued that the government merely showed the handgun was in the same room as the drug paraphernalia, and did not show it was connected to the offense. Although contrary to the Eighth Circuit, *see* United States v. Khang, 904 F.2d 1219, 1223 n.7 (8th Cir. 1990), the Eleventh Circuit panel agreed with the majority of circuits in holding that "once the government has shown proximity of the firearm to the site of the charged offense, the evidentiary burden shifts to the defense to demonstrate that a connection between the weapons and the offense is clearly improbable." *See* United States v. Cochran, 14 F.3d 1128, 1132 (6th Cir. 1994); United States v. Cantero, 995 F.2d 1407 (7th Cir. 1993); United States v. Corcimiglia, 967 F.2d 724, 727-28 (1st Cir. 1992); United States v. Roberts, 980 F.2d 645, 647 (10th Cir. 1992); United States v. Restrepo, 884 F.2d 1294, 1296 (9th Cir. 1989).

United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1203 (1998). The district court did not err in calculating the defendant's base offense level according to the guideline for crack rather than for cocaine hydrochloride. Because the jury's verdict did not

specify the object of the defendant's conspiracy, *i.e.*, possession with intent to distribute cocaine hydrochloride or crack cocaine, he could be sentenced under the guideline for crack cocaine only if "the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that offense." *See* United States v. McKinley, 995 F.2d 1020, 1025-26 (11th Cir.1993), *cert. denied*, 511 U.S. 1021, 114 S. Ct. 1405 (1994). The district court's finding that the purpose of the conspiracy was to cook crack was amply supported by the record. The conversion of powder cocaine into crack not only was foreseeable by defendant, but was plainly within the scope of the criminal activity that he undertook. There was evidence that defendant had discussed "cooking" the cocaine with the informant, and that a codefendant, in the defendant's presence, had told the informant that he was in the business of making crack and needed high quality cocaine for that job.

United States v. Ramsdale, 61 F.3d 825 (11th Cir. 1995). The district court erred in imposing a sentence based upon D-methamphetamine rather than L-methamphetamine when it failed to make findings as to the type of methamphetamine used in the offense. The defendant was convicted of conspiracy to manufacture amphetamine and was sentenced on the basis of D-methamphetamine. The circuit court noted its prior ruling that because methamphetamine requires a significantly harsher sentence under the guidelines than L-methamphetamine, the government bears the burden of production and persuasion as to the type of methamphetamine involved in the offense. United States v. Patrick, 983 F.2d 206 (11th Cir. 1993). The defendants, however, failed to object at sentencing. In addressing an issue of first impression in the Eleventh Circuit, the court joined the Third Circuit in ruling that a sentence lacking specific findings as to the type of methamphetamine used in the offense was plain error. The Third Circuit reasoned in United States v. Bogusz, 43 F.3d 82, 90 (3d Cir. 1994), *cert. denied*, 514 U.S. 1090 (1995), that "[c]onsidering the magnitude of the difference in sentencing that could result from the application of the wrong organic isomer, we think the sentencing court's failure to make this determination would result in a grave miscarriage of justice." The Tenth Circuit, however, held that by failing to make any objections to the sentencing court as to the type of methamphetamine, the defendant had waived the issue for appeal. United States v. Dennino, 29 F.3d 572, 580 (10th Cir. 1994), *cert. denied*, 513 U.S. 1158 (1995). The Eleventh Circuit ruled that to satisfy the plain error standard, a party must demonstrate that (1) there was an error in the district court's action; (2) such error was plain, clear or obvious, and (3) the error affected substantial rights, in that it was prejudicial and not harmless. United States v. Foree, 43 F.3d 1572, 1578 (11th Cir. 1995) (citing United States v. Olano, 113 S. Ct. 1770, 1777-79 (1993)). The court further noted that the government had conceded that sentencing based upon D-methamphetamine rather then L-methamphetamine makes a substantial difference in the severity of the sentence imposed. The government and the district court should have known that findings as to the type of methamphetamine were required, and that failure to make such findings had a profound impact on the range of possible sentences imposed.

United States v. Reid, 139 F.3d 1367 (11th Cir. 1998). The district court's lack of findings on the record as to why it did not apply the two-level reduction directed by §2D1.1(b)(6) (applicable if the defendant meets the safety valve criteria) precluded meaningful appellate review. The evidence of record did not demonstrate that defendant did not qualify. The court of appeals vacated the sentence and remanded for further proceedings.

United States v. Shields, 87 F.3d 1194 (11th Cir. 1996). The Eleventh Circuit, sitting en banc, upheld the district court's opinion that a marijuana grower who is apprehended after his

marijuana crop has been harvested should be sentenced according to the number of plants involved in the offense, as opposed to the weight of the marijuana. The circuit court noted that both the text of 18 U.S.C. § 841 and USSG §2D1.1 contain the phrase "involve marijuana plants," but neither suggests that their application depends upon whether the marijuana plants are harvested before or after the growers are apprehended. The circuit court rejected defendant's argument that the district court should not have applied the equivalency provision of USSG §2D1.1 because the dead plants were not "marijuana plants" within the meaning of the guidelines. An interpretation of USSG §2D1.1 which depends upon the state of affairs discovered by law enforcement officers (*ie*., whether plants are live or have been harvested) contradicts the principle of relevant conduct. The circuit court stated that relevant conduct includes all acts and omissions committed by the defendant. If defendant's relevant conduct includes growing marijuana plants, the equivalency provision applies, and the offense level will be calculated using the number of plants.

United States v. Sloan, 97 F.3d 1378 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2459 (1997). The district court did not err refusing to apply the rule of lenity to the defendant's sentence for distributing crack cocaine, despite the amendment of USSG §2D1.1(c), Note D to clarify the definition of "cocaine base" in the period between the defendant's commission of the offense and his sentencing. The appeals court concluded that prior to the amendment in question crack cocaine was within the category of drug known as "cocaine base" which Congress intended to punish more harshly than other forms of cocaine under both 21 U.S.C. § 841 and the sentencing guidelines. The court rejected the defendant's argument that the fact that "cocaine" and "cocaine base" are chemically synonymous rendered the meaning of the terms "cocaine" and "cocaine base" ambiguous prior to the amendment. The rule of lenity comes into operation only if Congress's intent with respect to statutory language (and sentencing interpretations) remains ambiguous after considering the structure, legislative history, and motivating policies behind the legislation. A finding as to congressional intent to impose more stringent penalties upon §841(b) offenses involving crack cocaine is applied to construction of the guidelines' distinction between cocaine and cocaine base offenses given that the two work as a unified whole. The appellate court found that Congress intended to address the increased use of crack cocaine by creating a tiered punishment system and increasing penalties under §841(b) for a subset of the broad cocaine-related substances "described in clause (ii) which contain cocaine base." The legislative history and motivating policies support this interpretation of Congress's intent. Finally, although Congress's later view as to the meaning of pre-existing law is not dispositive, its recent rejection of the guideline amendment to end the 100:1 weight ratio disparity confirms its intent. Although the court determined that Congress could have enacted a statute which more clearly expressed its intentions, the statute was not so ambiguous as to lead the defendant to conclude that his action in distributing a form of rock-like cocaine was entitled to treatment under the lower tier penalties of §841(b) or USSG §2D1.1(c). Therefore, the rule of lenity does not apply to this case.

United States v. Smith, 127 F.3d 1388 (11th Cir. 1997). The district court did not err in enhancing the defendant's base offense level for possession of a firearm in relation to a drug offense, even though he did not possess a firearm during the offense of conviction. The base offense level enhancement under the sentencing guidelines for possession of a firearm in relation to drug offense is authorized if the weapon was possessed during the offense of conviction or during the related relevant conduct.

United States v. Trout, 68 F.3d 1276 (11th Cir. 1995), *cert. denied*, 516 U.S. 1153 (1996). In an issue of first impression, the circuit court concluded that the rule of lenity does not require a sentencing court to apply 21 U.S.C. § 841(b)(1)(C) when it is unclear whether a defendant's sentence is governed by §841(b)(1)(A)(viii) or §841(b)(1)(B)(viii). The defendant argued that the district court failed to follow the rule of lenity because the court did not sentence him under the less severe "catchall" provision of §841(b)(1)(C). The circuit court agreed with the Fifth Circuit's holding that the rule of lenity applies to sentencing under § 841(b)(1)(B) prior to its 1990 amendment. *See* United States v. Sherrod, 964 F.2d 1501, 1505 (5th Cir.), *cert. denied*, 506 U.S. 1041 (1992). However, the circuit court concluded that the rule of lenity directs the court "to apply the lesser penalty when a statute presents an ambiguous choice between two punishments," not to forsake both possibilities and to search for an even more lenient alternative. The court noted that it is clear that Congress intended for sections 841(b)(1)(A)(viii) or (b)(1)(B)(viii) to apply in situations involving more than 100 grams of methamphetamines. In this case, because the district court sentenced the defendant under the less severe §841(b)(1)(B)(viii), the rule of lenity was applied. The court also rejected the defendant's argument that section 841(b)(1) was unconstitutionally vague and failed to provide the defendant with sufficient notice to satisfy due process concerns.

United States v. Zapata, 139 F.3d 1355 (11th Cir. 1998). The district court erred in "rounding up" its drug quantity calculations for purposes of determining the defendant's offense level. The amount of marijuana attributable to the defendant was 44 pounds, which the district court determined would yield a base offense level of 18 based on between 20 and 40 kilograms of marijuana. However, the 44 pounds of marijuana actually converted to 19.9584 kilograms of marijuana, resulting in a base offense level of 16. The court of appeals noted that the drug quantity table is clear and unambiguous that the conversion of 44 pounds of marijuana equals 19.9584 kilograms. The plain meaning of the guideline directs a base offense level of 16. Although sentencing may be based on fair, accurate, and conservative estimates of drug quantities attributable to a defendant, it cannot be based on calculations of drug quantities that are merely speculative. Because the rounding up was not based on any legal or factual support, the sentence was vacated and remanded for resentencing.

§2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

United States v. Saavedra, 1998 WL 454104 (11th Cir. Aug. 6, 1998). The district court erred in applying §2D1.2 to the defendant's drug conviction because he was not charged with a violation of 21 U.S.C. § 860, selling drugs near a school. Section 2D1.2 establishes base offense levels for violations of 21 U.S.C. § 860. The court of appeals held that § 860 is a substantive criminal offense that must be charged, not a mere sentence enhancer for certain classes of more general drug offenses. The defendant's uncharged but relevant conduct is irrelevant to determining which guideline is applicable to an offense; relevant conduct is properly considered only after the applicable guideline is selected, when the court is analyzing the various sentencing considerations withing the guideline chosen. Thus, the defendant's actual conduct was not the proper basis for applying §2D1.2, and the court should have applied §2D1.1, which establishes the base offense level for 21 U.S.C. § 841(a), the statute under which the defendant was convicted.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit

United States v. Bald, 132 F.3d 1414 (11th Cir. 1998). The district court properly included as actual loss all credit card charges made by defendants, including unauthorized purchases returned for credit before detection.

United States v. Bush, 126 F.3d 1298 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1109 (1998). The district court erred in failing to apply the enhancement for more than minimal planning where defendant embezzled funds through several fraudulent loans. The district court also erred in departing downward on the basis of "single act of aberrant behavior." The defendant's conduct was clearly not a single, "spontaneous and thoughtless act[,] rather than one which was the result of substantial planning," as required by circuit precedent in United States v. Withrow, 85 F.3d 527, 530-31 (1996). Whether "society has an interest" in incarcerating a particular defendant is a matter addressed by the guidelines generally, and is irrelevant to the question whether a particular defendant's conduct was in fact "aberrant" within the meaning of Ch. One, Pt. A.

United States v. Daniels, 1998 WL 438810 (11th Cir. Aug. 4, 1998). The district court did not err by refusing to exclude from the loss calculations $81,250 paid to the victim by the defendant's errors and omissions insurer. The court of appeals noted that the partial reimbursement did not change the amount the defendant embezzled, but only substituted his insurance company as another victim.

United States v. Goldberg, 60 F.3d 1536 (11th Cir. 1995). The district court erred in calculating loss pursuant to USSG §2F1.1. The defendant was convicted of possession and interstate transportation of stolen securities, bank fraud and attempted escape. The defendant argued on appeal that he deserved an evidentiary hearing to determine the number of bonds attributable to him and their value. The defendant further argued that the stolen bonds were worthless on their face. The circuit court ruled that the district court erred in failing to hold an evidentiary hearing to determine the actual number of bonds for which the defendant was responsible, and the face value of the bonds. The circuit court further ruled that for sentencing purposes the face value of bonds provides a reasonable quantification of the risk to unsuspecting buyers or lenders. *See* United States v. Jenkins, 901 F.2d 1075, 1084 (11th Cir.), *cert. denied*, 498 U.S. 901 (1990).

United States v. Schlei, 122 F.3d 944 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1523 (1998). The district court did not err in considering intended loss in calculating the defendant's offense level, even though the defendant was caught in a government sting operation. *Cf.* United States v. Sneed, 34 F.3d 1570, 1584 (10th Cir.1994) (holding that the intended loss in cases of government sting operations is zero).

United States v. Stevenson, 68 F.3d 1292 (11th Cir. 1995). In a matter of first impression, the Eleventh Circuit ruled "that the sentencing guidelines permit the cumulative enhancement of a sentence under the more than minimal planning provision of USSG §2F1.1 and the aggravating role provision of USSG §3B1.1. The court noted the circuit split on this issue and recognized that a

majority of the circuits have held that the guidelines permit the application of both enhancements. *See* United States v. Massey, 48 F.3d 1560, 1570 (10th Cir.), *cert. denied*, 515 U.S. 1167 (1995); United States v. Godfrey, 25 F.3d 263, 264 (5th Cir.), *cert. denied*, 513 U.S. 965 (1994); United States v. Wong, 3 F.3d 667, 670-72 (3d Cir. 1993); United States v. Rappaport, 999 F.2d 57, 60-61 (2d Cir. 1993); United States v. Willis, 997 F.2d 407, 418-19 (8th Cir. 1993), *cert. denied*, 510 U.S. 1050 (1994); United States v. Kelly, 993 F.2d 702, 704-05 (9th Cir. 1993); United States v. Curtis, 934 F.2d 553, 556 (4th Cir. 1991); United States v. Boula, 932 F.2d 651, 654-55 (7th Cir. 1991). *But see* United States v. Romano, 970 F.2d 164, 167 (6th Cir. 1992) ("considerations of lenity and due process forbid the cumulative application" of these enhancements.. The Eleventh Circuit reasoned that neither the text nor the commentary of USSG §2F1.1 or USSG §3B1.1, suggests an intent to preclude the cumulative application of those sections. The circuit court also relied on a recent amendment to USSG §1B1.1 stating that adjustments from guideline sections are to be applied cumulatively absent an instruction to the contrary to support its decision. The circuit court added that the unofficial commentary highlighting the 1993 amendments in the November 1993 Guidelines Manual explains that the amendment was in response to the Sixth Circuit's decision in Romano, *infra*. The district court was affirmed.

United States v. Toussaint, 84 F.3d 1406 (11th Cir. 1996). The district court did not err in its calculation of the amount of loss under USSG §2F1.1. The defendant was convicted of conspiracy to make false statements and making false statements on a disaster loan application to the Small Business Administration (SBA), wherein he averred that he had suffered over $360,000 in losses from damage caused by Hurricane Andrew, although he actually suffered no loss. The defendant's scheme was discovered prior to the processing of the application, and no actual loss was incurred by the SBA. Based on the finding that the defendant intended the SBA to incur a $360,000 loss, the district court enhanced the defendant's base offense level under §2F1.1. The defendant argued that an adjustment under §2F1.1 is only applicable if "some actual dollar amounts were lost." In rejecting this argument, the circuit court noted the commentary to §2F1.1, which states that "the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss)" and "where the intended loss is greater than the actual loss, the intended loss is to be used" in calculating the amount of loss. The circuit court concluded that this language indicates that the defendant's intent to cause a loss is the relevant inquiry, and "the fact that no loss occurred is immaterial." *See also* United States v. Menichino, 989 F.2d 438 (11th Cir. 1993) (sentence enhancement under §2F1.1 appropriate despite fact that loan, secured via fraudulent appraisal, was never issued). The decision of the district court was affirmed.

Part J Offenses Involving the Administration of Justice

§2J1.7 Commission of Offense While on Release

United States v. Bozza, 132 F.3d 659 (11th Cir. 1998). The district court did not err in imposing a sentencing enhancement for commission of an offense while out on bond pursuant to USSG §2J1.7 without having notified the defendant of the enhancement prior to the entry of his guilty plea. Section 2J1.7 does not require a district court to notify the defendant of the sentencing enhancement prior to accepting his or her guilty plea.

United States v. Williams, 59 F.3d 1180 (11th Cir. 1995), *cert. denied,* 517 U.S. 1157 (1996). The Sentencing Commission did not overstep its bounds in promulgating USSG §2J1.7, which calls for a three-level enhancement if the defendant commits a federal offense while on release. "18 U.S.C. § 3147 authorizes the Commission to provide for enhancement for crimes committed while on release pursuant to the Bail Reform Act."

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

United States v. Aduwo, 64 F.3d 626 (11th Cir. 1995). The district court did not err in applying the cross-reference provision in USSG §2K2.1 in calculating the defendant's sentence. The defendant pleaded guilty to making false statements to acquire firearms and possession of a firearm by a convicted felon. The defendant was involved in an attempted armed robbery in which her co-conspirator carried a gun. The district court applied the cross-reference provision in USSG §2K2.1 which directs the court to sentence the defendant according to the guideline for the offense that the defendant committed while in possession of the firearm. The defendant argued on appeal that the cross-reference provision was not applicable because she did not possess a firearm in connection with the attempted armed robbery, because the plan did not include the use of weapons, because she did not have possession of a weapon during the attempted robbery, and because she did not know a firearm was present during her participation in the crime. In a matter of first impression, the Eleventh Circuit applied the Pinkerton rule of conspirator liability to USSG §2K2.1. In Pinkerton v. United States, 328 U.S. 640 (1946), the Supreme Court held that conspirators are liable for the reasonably foreseeable acts of their co-conspirators in furtherance of the conspiracy. The circuit court recognized that defendants who illegally possess firearms will be sentenced under USSG §2K2.1(a) and (b), but defendants who then use that weapon in another crime are eligible for a longer sentence under the guideline applicable to the subsequent crime, which allows the sentencing court to impose a sentence that "reflects the magnitude of the crime." The circuit court held that since the co-conspirator's possession of a concealed firearm during the attempted robbery was foreseeable and in furtherance of a "drug rip-off," the possession of the firearm could be imputed to the defendant.

United States v. Flennory, 145 F.3d 1264 (11th Cir. 1998). The district court did not err in imposing a 12-point enhancement under §2K2.1(c)(1)(A) when sentencing the defendant on a felon-

in-possession count. The defendant pleaded guilty to one count of 18 U.S.C. § 922(g) and to one count of 18 U.S.C. § 924(c) in connection with drug trafficking. He contended that his base offense level for the § 922(g) count, calculated under §2K2.1, should not have been enhanced via the cross-reference to the drug guideline because possession of a firearm in connection with a drug offense is addressed by the mandatory sentence required by § 924(c). The defendant argued the enhancement resulted in double counting. The court of appeals rejected defendant's arguments. The court noted that, although §2K2.4, the guideline for the § 924(c) count, prohibits application of any specific offense characteristic for the possession, use, or discharge of an explosive or firearm for an underlying offense, the felon-in-possession count was not the underlying offense charged in connection with the § 924(c) count. Because the § 922(g) offense is not an underlying offense within the meaning of §2K2.4, application note 2, the sentence enhancements for the violation of § 922(g) were not barred by §2K2.4 and did not constitute double counting.

United States v. Paredes, 139 F.3d 840 (11th Cir. 1998). The district court did not err in enhancing the defendant's offense four levels under §2K2.12(b)(5) for using the firearm in connection with another felony offense. The defendant argued that the enhancement was barred by application note 2 to §2K2.4, which prohibits application of any specific offense characteristic for the possession, use, etc., of a firearm when sentencing for an underlying offense to a § 924(c) conviction. The defendant argued that, due to the grouping of the § 922(g) conviction with his robbery conviction (the predicate offense for his § 924(c) conviction), the § 922(g) conviction should be deemed to be the underling offense for purposes of the application note. The court of appeals rejected this argument, holding that the "underlying offense" for purposes of §2K2.4, application note 2, is the "crime of violence" or "drug trafficking offense" that serves as the basis for the § 924(c) conviction. The fact that the crime of violence was grouped with the § 922(g) offense for purposes of sentencing does not change the conclusion. "Underlying offense" must be the crime during which, by using the gun, the defendant violated § 924(c).

United States v. Willis, 106 F.3d 966 (11th Cir. 1997). The district court erred in finding that the defendant who pleaded nolo contendere in a state court to charges of carrying a concealed firearm and grand theft of a firearm, but whose adjudication of guilt was withheld, was "convicted" of a felony within the meaning of the federal firearms statute. The defendant argued that his possession count should have been dismissed because he pleaded nolo contendere to the alleged predicate offenses and such a plea did not amount to a prior conviction within the meaning of 18 U.S.C. § 922(g)(1). The statute provides, in relevant part, that what constitutes a conviction of a crime punishable by imprisonment for a term exceeding a year shall be determined in accordance with the law of the state in which proceedings are held. In reviewing Florida law, the court was faced with an issue of first impression and relied on the United States District Court for the Northern District of Florida who had previously addressed this issue. In United States v. Thompson, 756 F. Supp. 1492 (N.D. Fla. 1991), that court dismissed the four section 922(g)(1) counts, finding that the defendant had not been "convicted" of a prior felony within the meaning of the statute because he had pleaded nolo contendere. The district court concluded that where a nolo plea is being used as an essential element of another offense, Florida law would not consider such plea to be a conviction. The appellate court agreed with this interpretation, and held that the district court had erred in defining such a plea as a conviction.

United States v. Wimbush, 103 F.3d 968 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1859 (1997). The appellate court affirmed the district court's calculation of the defendant's sentence pursuant to USSG §2K2.1. The defendant argued that USSG §2K2.1, as amended, was invalid because it substantially increased the punishment level without adequately explaining the reasons for the changes, as required by the Administrative Procedures Act ("APA"). The appellate court disagreed, and held that "Federal courts do not have authority to review the Commission's actions for compliance with APA provisions, at least insofar as the adequacy of the statement of the basis and purpose of an amendment is concerned."

§2K2.4 Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

United States v. Bazemore, 138 F.3d 947 (11th Cir. 1998). The district court did not err in denying Bazemore's 28 U.S.C. § 2255 motion to vacate his conviction for using or carrying a firearm in connection with a drug trafficking offense. Bazemore argued that the Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995), meant that the conduct he pleaded guilty to, participating in a drug trafficking crime in which a codefendant carried a weapon, did not violate 18 U.S.C. § 924(c). The court of appeals upheld the district court's finding that Bazemore had aided and abetted his codefendant in "carrying" the weapon, and that he was therefore liable for the crime and his plea was properly accepted.

See United States v. Paredes, 139 F.3d 840 (11th Cir. 1998), §2K2.1, p. 12.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Lozano, 138 F.3d 915 (11th Cir. 1998). The district court's application of the aggravated felony enhancement, based on the defendant's previous deportation having been subsequent to the commission of an aggravated felony, did not violate the ex post facto clause. The defendant had been convicted for cocaine distribution and deported in 1992. He was discovered in the United States in 1996 and pleaded guilty to illegal reentry after deportation in violation of 8 U.S.C. § 1326(a). The court imposed a 16-level increase under §2L1.2(b)(2) because the previous deportation was subsequent to an aggravated felony. Defendant argued the enhancement violates the ex post facto clause by punishing him for earlier conduct under a law and guideline not in effect at the time of the conduct. The court of appeals agreed with other courts which have considered the issue in finding that the law does not apply to events occurring prior to its enactment; the offense for which defendant was sentenced was being found in the United States after illegally reentering the country. At the time of the commission of that offense, the penalties were unambiguous. *See, e.g.*, United States v. Baca-Valenzuela, 118 F.3d 1223, 1231 (8th Cir. 1997); Unites States v. Cabrera-Sosa, 81 F.3d 998, 1001 (10th Cir.), *cert. denied*, 117 S. Ct. 218 (1996); United States v. Saenz-Forero, 27 F.3d 1016, 1020 (5th Cir. 1994); United States v. Arzate-Nunez, 18 F.3d 730, 734 (9th Cir. 1994).

United States v. Palacios-Casquete, 55 F.3d 557 (11th Cir. 1995), *cert. denied*, 516 U.S. 1120 (1996). The district court did not err in applying 18 U.S.C. § 1326(b)(2) as a sentencing enhancement provision. The defendant pleaded guilty to being a deported alien found unlawfully in the United States in violation of 18 U.S.C. § 1326. The defendant claimed that because the indictment to which he pleaded guilty did not mention any of his prior convictions, he was not given notice that he was pleading guilty to any offense other than being found in the United States after having been deported. The defendant claimed that the court's use of 18 U.S.C. § 1326(b)(2) as a sentence enhancement provision rather than as a statement of a separate offense violated his due process rights. 18 U.S.C. § 1326(b)(2) applies to any alien who has been deported and is found at any time in the United States after having been convicted of an aggravated felony. The statute mandates a fine and a custodial sentence not to exceed 15 years. The circuit court recognized the line of cases from the Ninth Circuit which interpret 18 U.S.C. § 1326(b)(1) and (b)(2) to state separate crimes, not sentencing enhancements. *See* United States v. Campos-Martinez, 976 F.2d 589 (9th Cir. 1992) (sections 1326(a) and 1326(b) state separate crimes); United States v. Gonzalez-Medina, 976 F.2d 570 (9th Cir. 1992) (same) (citing dicta in United States v. Arias-Granados, 941 F.2d 996 (9th Cir. 1991) (plea bargain)). The court noted that the four other circuits have rejected the Ninth Circuit's line of cases and have applied 18 U.S.C. § 1326(b) as a sentence enhancement provision. *See* United States v. Crawford, 18 F.3d 1173 (4th Cir.) (section 1326(b) is a sentence enhancement provision), *cert. denied*, 513 U.S. 860 (1994); United States v. Forbes, 16 F.3d 1294 (1st Cir. 1994) (same); United States v. Vasquez-Olvera, 999 F.2d 943 (5th Cir. 1993) (King J., dissenting), *cert. denied*, 510 U.S. 1076 (1994)(same); *see also* United States v. Cole, 32 F.3d 16 (2d Cir.) (a sentence-enhancement provision rather than a separate offense), *cert. denied*, 513 U.S. 993 (1994). In making its ruling, the circuit court relied on its holding in United States v. McGatha, 891 F.2d 1520, 1522-23 (11th Cir.), *cert. denied*, 495 U.S. 938 (1990), where it treated 18 U.S.C. § 924(e)(1) as a sentence enhancement provision, and not as the creation of a new, separate offense which must be alleged in the indictment and proved at trial. The court joined the other four circuits that discussed the legislative evolution of 18 U.S.C. § 1326 through its various amendments and concluded that Congress intended § 1326 to denounce one substantive crime — unlawful presence in the United States after having been deported, with the sentence to be enhanced incrementally for those aliens who commit the offense after having been deported following convictions for "nonaggravated" or "aggravated" felonies.

§2L2.1 Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

United States v. Kuku, 129 F.3d 1435 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 2071 (1998). The district court erred in applying §2F1.1, the guideline for fraud, deceit and forgery, to calculate the defendant's sentence because §2L2.1, involving counterfeit identification documents, more aptly characterized the offense conduct. The defendant's conduct, encouraging and inducing aliens to reside in the United States, making false statements on applications for social security cards, and producing social security cards without lawful authority, arose from her participation in a conspiracy to unlawfully produce social security cards and sell them to illegal aliens.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments

United States v. Mullens, 65 F.3d 1560 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112 (1996). The district court did not err in calculating the amount of funds involved in the defendant's money laundering scheme. The defendant pleaded guilty to wire fraud, mail fraud and money laundering in relation to a "Ponzi" scheme. The defendant's money laundering and fraud convictions were grouped pursuant to USSG §3D1.2. On appeal, the defendant argued that the district court erred in determining the value of funds by considering the total amount of money collected in the "Ponzi" scheme. The circuit court noted that when offenses are grouped pursuant to USSG §3D1.2, a sentencing court is "required to consider the total amount of funds that it believed was involved in the course of criminal conduct." The circuit court ruled that the amount of money collected by the defendant through fraud was co-extensive with the sums involved in the charged and uncharged money laundering counts thereby warranting a ten-level enhancement for laundering in excess of $20 million.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

United States v. Malone, 78 F.3d 518 (11th Cir. 1996). The district court did not err in imposing a vulnerable victim enhancement to the defendant's sentence for the carjacking of a taxicab driver. The court noted that enhancing a defendant's sentence based solely on his membership in a more "vulnerable class" of persons is not consistent with the purpose behind USSG §3A1.1 because the vulnerable victim enhancement is intended to "focus chiefly on the conduct of the defendant and should be applied only where the defendant selects the victim due to the victim's perceived vulnerability." However, in this case, the defendant testified that calling for a cab saved him from having to go out and find a victim. The cab driver in this case was obligated under a city ordinance to respond to all dispatcher calls, including the call in question to a deserted neighborhood making him more vulnerable than cab drivers in general to carjacking.

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995), *cert. denied*, 516 U.S. 1166 (1996). The district court did not err in enhancing the defendant's base offense level pursuant to USSG §3A1.1, the vulnerable victim guideline. The defendant was convicted of conspiracy to commit mail and wire fraud, and wire fraud for fraudulent conduct while operating a loan brokerage firm. The defendant argued on appeal that the district court erred in applying USSG §3A1.1 because vulnerability for sentencing purposes is measured at the time of the commencement of the crime and the victim's vulnerability in this case, which was defined as his absence from the country, occurred after the crime began. The circuit court noted that the two circuits which have addressed this specific issue reached opposite conclusions. The Ninth Circuit held that USSG §3A1.1 does not require defendants to have targeted victims because of their vulnerability, and excludes only those

whose vulnerability was not known to defendants. United States v. O'Brien, 50 F.3d 751, 754-55 (9th Cir. 1995). The First Circuit, however, held that USSG §3A1.1 applies only to victims whom the defendant targeted because of their vulnerability. United States v. Rowe, 999 F.2d 14, 17 (1st Cir. 1993). The circuit court recognized that its own precedent is ambiguous on this issue. Compare United States v. Long, 935 F.2d 1207, 1210 (11th Cir. 1991) ("Section 3A1.1 is intended to enhance the punishment for offenses where the defendant selects the victim due to the victim's perceived susceptibility to the offense") with United States v. Salemi, 26 F.3d 1084, 1088 (11th Cir.) (holding that crime involving a six-month-old baby automatically justified vulnerable victim enhancement even though defendant apparently did not select victim for that reason), *cert. denied*, 115 S. Ct. 612 (1994). The circuit court ruled that under either interpretation, the enhancement was properly applied in this case because the defendants had "targeted" the victim to take advantage of his vulnerability: his absence from the country. The circuit court limited its ruling in scope, holding "only that in cases where the `thrust of the wrongdoing' was continuing in nature, the defendants' attempt to exploit the victim's vulnerability will result in an enhancement even if that vulnerability did not exist at the time the defendant initially targeted the victim."

Part B Role in the Offense

§3B1.2 Mitigating Role

United States v. Campbell, 139 F.3d 820 (11th Cir. 1998). The district court erred in denying the defendant a sentence reduction for minor or minimal role for reasons relating solely to her status as a drug courier. The district court stated that it did not believe that people who leave the country knowing they will be asked to bring back something illegal for money should not receive a role adjustment because, while such defendants are a minor link in the illegal drug importation, they are an important link. The court of appeals held that these considerations were improper because they relate solely to Campbell's status as a drug courier, which cannot, as a matter of law, preclude a defendant from receiving a downward adjustment based on her role in the offense.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997). The district court erred imposing the abuse of trust enhancement on the defendant because any abuse of his position at the Housing Authority was unrelated to the offense for which he was convicted, tax evasion. The government contended that the district court was correct because absent the defendant's abuse of his position of trust, he could not have committed the offense for which he was convicted. In an issue of first impression, the circuit court phrased the required connection as between the abuse of the position of trust and the offense of conviction. The court reasoned that the sentencing guidelines themselves say that the defendant's abuse of trust must "significantly facilitate the commission or concealment of the offense." In this context, "offense" must be read as "offense of conviction" in order to maintain consistency with the definition of relevant conduct in §1B1.3(a).

United States v. Exarhos, 135 F.3d 723 (11th Cir. 1998). The district court did not err in enhancing §3B1.3 for use of a special skill where the defendants were convicted of altering or removing vehicle identification numbers from stolen automobile parts. The remote locations of the

VINs require anyone seeking to obliterate or re-stamp them to possess specialized knowledge and mechanical skill. Dismantling cars — not to mention abandoning them, recovering the shells, and then putting the cars back together — involves a combination of skills not possessed by the general public.

United States v. Garrison, 133 F.3d 831 (11th Cir. 1998). The district court erred in applying an enhancement for abuse of a position of trust where the defendant was convicted of Medicare fraud. The defendant, the owner and chief executive officer of a home healthcare provider, and her company did not report directly to Medicare but to a fiscal intermediary whose specific responsibility was to review and to approve requests for Medicare reimbursement before submitting those claims to Medicare. Because of this removed relationship to Medicare, plus the intermediate review of the Medicare requests, the defendant was not directly in a position of trust in relation to Medicare.

United States v. Long, 122 F.3d 1360 (11th Cir. 1997). The district court erred in applying a USSG §3B1.3 enhancement for abuse of a position of trust. While employed as a food service foreman in the United States Penitentiary-Atlanta, defendant was arrested while attempting to carry 85.1 grams of cocaine into the prison. Long acknowledged that the Bureau of Prisons "trusted" him in the colloquial sense but argued that he did not occupy a "position of trust." The Government countered that Long occupied a position of trust because prison officials did not search him when he entered the prison. The circuit court held that Long did not occupy a "position of trust" as §3B1.3 defines that term; the Government's reading would extend to virtually every employment situation because employers "trust" their employees; the guideline does not intend coverage this broad.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

United States v. Mullens, 65 F.3d 1560 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112 (1996). In a matter of first impression, the Eleventh Circuit ruled that the district court did not err in grouping money laundering offenses (USSG §2S1.1) with fraud offenses (USSG §2F1.1) pursuant to USSG §3D1.2 in order to calculate the defendant's base offense level. The defendant pleaded guilty to wire fraud, mail fraud and money laundering related to the operation of a "Ponzi" scheme. USSG §3D1.2 provides that "counts involving substantially the same harm shall be grouped `when the offense level is determined largely on the basis of the total amount of harm or loss . . . or some other measure of aggregate harm.'" The circuit court recognized that the purpose of USSG §3D1.2 is "to combine offenses involving closely related counts." *See* United States v. Harper, 972 F.2d 321, 322 (11th Cir. 1992). The circuit court ruled that the fraud and money laundering counts were related to the same general type of offense because both were integral to the success of the defendant's "Ponzi" scheme. The circuit court recognized that without the fraud, the defendant would have not had funds to launder and ruled that the district court had properly grouped the counts pursuant to USSG §3D1.2.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Bourne, 130 F.3d 1444 (11th Cir. 1997). The district court did not err in allowing only a two-level reduction for the defendant' acceptance of responsibility, as his guilty plea on the last count was not timely. The court of appeals reasoned that when there are multiple counts of conviction, adjustment for acceptance of responsibility is applied after all the offenses have been aggregated pursuant to USSG §1B1.1. To be entitled to an adjustment, a defendant must accept responsibility for each crime to which he is being sentenced; otherwise, a defendant would receive a benefit on his offense for both robberies even though he accepted responsibility for only one robbery.

United States v. McPhee, 108 F.3d 287 (11th Cir. 1997). The sentencing court did not have the discretion to apply less than the three-level decrease for acceptance of responsibility and cooperation under USSG §3E1.1(a) and (b). Once the defendant qualifies for the decrease, the three-level decrease is mandated. The appellate court held that the sentencing guidelines provide for a two-level reduction in a defendant's base offense level for acceptance of responsibility, plus an additional one-level reduction provided the defendant's cooperation was timely. Except for an attempted escape, the appellate court determined that the defendant fully qualified for the three-level reduction. The only issue was whether the defendant actually intended to escape, and whether the reduction for acceptance of responsibility should be taken away because of that activity. Under the law of the Sixth Circuit, there is no discretion to award less than a two-level reduction. According to the appellate court, however, the court has yet to determine whether the third point reduction under §3E1.1(b) can be withheld for reasons unrelated to the timeliness of the cooperation. Relying on decisions by other circuits, the appellate court reasoned that obstructionist conduct following the guilty plea was irrelevant to whether the defendant was entitled to a one-level reduction provided under USSG §3E1.1(b), *e.g.*, United States v. Talladino, 38 F.3d 1255, 1263-64 (1st Cir. 1994). The court held that the language of the guideline was absolute on its face and simply did not confer any discretion on the sentencing judge to deny the extra one-level reduction so long as the subsection's stated requirements were satisfied.

United States v. Smith, 127 F.3d 987 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1202 (1998). The district court did not err in considering the nature of the challenges to the presentence report in determining whether the defendant should receive a reduction for acceptance of responsibility. In his objections to the PSR, the defendant contended that he did not possess fraudulent intent with respect to both offense conduct and relevant conduct. These objections were factual, not legal, and amounted to a denial of factual guilt.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.2 Definitions and Instruction for Criminal History

United States v. Bankston, 121 F.3d 1411 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 735 (1998). The district court did not err in concluding that prior felony conviction based on plea of guilty but mentally ill (GBMI), pursuant to Georgia law, can be used as predicate offense to establish career offender status under sentencing guidelines. The court of appeals examined Georgia law and found that a conviction based on the GBMI plea has the same force and legal effect as a conviction established by a plea of guilty and is therefore is a "guilty plea" within the meaning of USSG §4A1.2(a)(4) of the guidelines.

United States v. Gass, 109 F.3d 677 (11th Cir. 1997). As a matter of first impression, the district court properly relied on the defendant's prior juvenile conviction and sentence to increase the defendant's criminal history score. The defendant argued that he should not have been assessed an additional three criminal history points for several prior bank robbery convictions because the Federal Youth Corrections Act (FYCA) set aside and "expunged" the convictions pursuant to USSG §4A1.2(j). The circuit court rejected the defendant's argument and affirmed the previous holding in United States v. Doe, 747 F.2d 1358 (11th Cir. 1984), in which the Eleventh Circuit held that section 5021(a) of the FYCA did not entitle a defendant to have a conviction record expunged or destroyed. Additionally, the circuit court refused to find that section 5021(a)'s "set aside" provision was synonymous with USSG §4A1.2(j)'s "expungement" reference. Moreover, the majority of circuits have similarly construed section 5021 of the FYCA and its relationship to the sentencing statute.

United States v. Pielago, 135 F.3d 703 (11th Cir. 1998). The district court erred in counting the defendant's 1986 six-month sentence to a community treatment center as a "sentence of imprisonment" under USSG §4A1.1(b). In a case of first impression, the circuit court followed the Ninth Circuit in United States v. Latimer, 991 F.2d 1509 (9th Cir. 1993), in concluding that a term of confinement in a community treatment center, like residency in a halfway house, is not a sentence of imprisonment.

§4A1.3 Adequacy of Criminal History

United States v. Dixon, 71 F.3d 380 (11th Cir. 1995). In an issue of first impression, the circuit court joined with the Second, Fifth, and Sixth Circuits, to hold that sentencing courts need not make step-by-step findings en route to the ultimate sentencing range when the court, pursuant to USSG §4A1.3 departs above Criminal History Category VI. *See* United States v. Daughenbaugh, 49 F.3d 171, 174-75 (5th Cir.), *cert. denied*, 116 S. Ct. 258 (1995); United States v. Thomas, 24 F.3d 829, 834-36 (6th Cir.), *cert. denied*, 513 U.S. 976 (1994); United States v. Harris, 13 F.3d 555, 558-59 (2d Cir. 1994). The district court, pursuant to §4A1.3, upwardly departed three levels (from 30 to 33). The defendant contended that the district court erred in upwardly departing three levels without first explicitly considering whether the ranges corresponding to the offense levels one and two levels higher than the original offense level would have been appropriate. The defendant argued

that the 1992 amendment to USSG §4A1.3 (policy statement) requires sentencing courts to follow the same procedure for upwardly departing from a criminal history category above category VI as below category VI, including the requirement to discuss each category it passes over en route to the category that adequately reflects the defendant's past criminal conduct. *See* United States v. Williams, 989 F.2d 1137, 1142 (11th Cir. 1993); United States v. Johnson, 934 F.2d 1237, 1239-40 (11th Cir. 1991). As amended in 1992, §4A1.3 states that a court upwardly departing from category VI "should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case." The circuit court concluded that because the guidelines provide no objective criteria for determining how far down the offense level axis the sentencing court need travel in order to reflect accurately the defendant's criminal history above category VI, the sentencing court must have discretion to determine the offense level that will correspond to the appropriate sentencing range for a given defendant. The circuit court concluded that sentencing courts need not make step-by-step findings en route to the ultimate sentencing range, rather, criminal history departures above category VI will be reviewed for reasonableness, based on findings as to why an upward departure is warranted and why the particular sentencing range chosen is appropriate.

United States v. Mellerson, 145 F.3d 1255 (11th Cir. 1998). The district court did not err in departing upward on the defendant's offense level because the criminal history category of VI did not adequately reflect the seriousness of his criminal history. The defendant had a total of 40 criminal history points, 27 more than necessary to put him in category VI.

See United States v. Webb, 139 F.3d 1390 (11th Cir. 1998), §4B1.1, p. 21, *infra*.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Gilbert, 138 F.3d 1371 (11th Cir. 1998). The district court did not err in sentencing the defendant as a career offender after finding that carrying a concealed firearm in violation of Florida law is a predicate "crime of violence." The court of appeals held that carrying a concealed weapon "presents a serious potential risk of physical injury" under §4B1.2(1).

United States v. Gonsalves, 121 F.3d 1416 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 736 (1998). The district court did not err in sentencing the defendants as career offenders based on prior state conviction. The defendants argue that the Commission went beyond the statutory authority in 28 U.S.C. § 994(h) by including state court convictions in this guideline. The court of appeals followed five other circuits in holding that §4B1.1 does not exceed its statutory authority by including state court convictions in addition to federal convictions as permissible predicate offenses for career offender enhancement. *See* United States v. Brown, 23 F.3d 839 (4th Cir. 1994); United States v. Consuegra, 22 F.3d 788, 790 (8th Cir. 1994); United States v. Beasley, 12 F.3d 280 (1st Cir. 1993); United States v. Rivera, 996 F.2d 993, 995-97 (9th Cir. 1993); United States v. Whyte, 892 F.2d 1170, 1174 (3rd Cir. 1989). If Congress had wanted only convictions under particular federal statutes to serve as predicate offenses, it could have said so quite simply. Instead, Congress referred to "offenses described in" — not "convictions obtained under" — those statutes.

United States v. Hernandez, 145 F.3d 1433 (11th Cir. 1998). The district court erred in using arrest affidavits to determine whether the defendant's state conviction was for a "controlled substance offense" necessary for the career offender enhancement. The defendant asserted that, because the prior offenses were under a Florida statute that made both the sale or purchase of narcotics a crime, his state court convictions may have been merely for the purchase of narcotics and as such would not qualify as controlled substance offenses under the guidelines. Nor did the judgments in the cases indicate whether the convictions were for sale or purchase. To resolve the ambiguity in the statute and judgements, the district court reviewed the police arrest affidavits underlying the convictions and determined that the defendant was arrested for the sale of narcotics. The court of appeals agreed with the defendant, noting that the focus of the inquiry must be upon the conduct of which the defendant was convicted, not the conduct for which he was arrested. It was unclear what exactly the defendant pleaded to; the inquiry in resolving the ambiguity of the 1993 convictions should be limited to examining easily produced and evaluated court documents, such as any helpful plea agreements or transcripts, any presentencing reports adopted by the sentencing judge, and any findings made by the sentencing judge.

United States v. Webb, 139 F.3d 1390 (11th Cir. 1998). The district court erred in concluding that it lacked the authority to grant a downward departure with respect to a defendant classified as a career offender. The court of appeals held that §4A1.3, which authorizes an upward or downward departure when the criminal history category does not adequately reflect the seriousness of defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, also authorizes a downward departure when the defendant's classification as a career offender overstates the seriousness of his criminal history.

United States v. Weir, 51 F.3d 1031 (11th Cir. 1995), *cert. denied*, 516 U.S. 1120 (1996). The district court erred in holding that the defendant's conviction for conspiracy to possess with intent to distribute marijuana was not a "controlled substance offense" for purposes of the career offender guideline, USSG §4B1.1. In so deciding, the appellate court joined the majority of the circuits in rejecting the District of Columbia Circuit's opinion in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993). *See* United States v. Hightower, 25 F.3d 182, 186-7 (3d Cir.), *cert. denied*, 513 U.S. 952 (1994) (same); United States v. Kennedy, 32 F.3d 876, 888 (4th Cir.), *cert. denied*, 513 U.S. 1128 (1994); United States v. Damerville, 27 F.3d 254, 256-57 (7th Cir.), *cert. denied*, 513 U.S. 972 (1994); Dyer v. United States, 23 F.3d 1421, 1424 n.2 (8th Cir.), *cert. denied*, 498 U.S. 907 (1994); United States v. Heim, 15 F.3d 830, 831-32 (9th Cir.), *cert. denied*, 513 U.S. 1033 (1994); United States v. Allen, 24 F.3d 1180, 1186 (10th Cir.), *cert. denied*, 513 U.S. 992 (1994). *But see* United States v. Bellazerius, 24 F.3d 698, 701-02 (5th Cir.), *cert. denied*, 513 U.S. 954 (1994) (supporting Price). Although the commentary suggests that §4B1.1 implements the mandate of 28 U.S.C. § 994(h), it does not suggest that that section is the only mandate for the career offender provision. The guidelines' enabling statute at 28 U.S.C. § 994(a) provides independent grounds for the career offender provision, "and the language of this section grants sufficient authority to the Commission to include drug conspiracies in its definition of controlled substance offenses." Furthermore, "common sense dictates that conspiring to distribute drugs constitutes a controlled substance offense." The sentence was vacated and remanded for resentencing.

§4B1.2 Definitions of Terms Used in Section 4B1.1

United States v. Spell, 44 F.3d 936 (11th Cir. 1995). The district court erred in determining that the defendant's prior state burglary conviction was a "crime of violence" under the career offender guidelines by relying on the charging documents behind the conviction without first determining whether the defendant pleaded guilty to crimes charged. The defendant argued that his prior Florida burglary conviction did not constitute a "crime of violence" because the state court's judgment was for the "burglary of a structure" under Florida's burglary statute. Because the judgment did not specify that the structure was a dwelling, and because burglaries which do not involve dwellings or occupied structures are not "crimes of violence" under United States v. Smith, 10 F.3d 724, 730 (10th Cir. 1993), the defendant claimed that this conviction was not technically a "crime of violence." Furthermore, the defendant claimed that Supreme Court and Eleventh Circuit precedent establish that a district court may not look behind a conviction to the charging document to determine whether a conviction constitutes a crime of violence. Taylor v. United States, 495 U.S. 575, 601-603 (1990); United States v. Wright, 968 F.2d 1167, 1172 (11th Cir. 1992), *vacated on other grounds*, 113 S. Ct. 2325 (1993); United States v. Gonzalez-Lopez, 911 F.2d 542, 547 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991). Rather, the district court must take a "categorical approach" and look no farther than the judgment of conviction. The circuit court disagreed, concluding that Application Note 2 to §4B1.2 rejects the categorical approach of these cases, which were decided under a previous version of the guidelines, and permits examination of the charging document if "ambiguities in the judgment make the crime of violence determination impossible from the face of the judgment itself." Smith, 10 F.3d at 733. In this case, the charging documents charged the defendant with burglary of a dwelling, and thus the district court had ruled that the defendant's prior conviction was indeed a "crime of violence." The circuit court held, however, that the district court's analysis was improper because it relied on conduct contained in the charging document without first determining whether the defendant was convicted for the charged offense. Because USSG §4B1.2 specifies that "the conduct of which the defendant was convicted is the focus of inquiry," the district court should have established that the crime charged was the same crime for which the defendant was convicted, and then establish whether the offense of conviction was actually a "crime of violence." On remand, the district court should examine the defendant's plea in the state case.

§4B1.4 Armed Career Criminal

United States v. Cobia, 41 F.3d 1473 (11th Cir.), *cert. denied*, 514 U.S. 1121 (1995). The district court did not err in sentencing the defendant as an armed career criminal pursuant to 18 U.S.C. § 924(e) even though the government did not affirmatively seek such an enhancement. The defendant contended that the government must affirmatively seek the enhancement for a court to apply section 924(e). He argued that the commentary to USSG §4B1.4, which sets forth the procedure for imposing a section 924(e) enhancement, specifies that the application of the enhancement is governed by the practice in the jurisdiction where the defendant is sentenced. Because it had been the practice in the district where the defendant was sentenced for the prosecution to affirmatively seek a section 924(e) enhancement, the defendant claimed that the application of section 924(e) was not mandatory. The circuit court, addressing an issue of first impression, rejected this argument and held that the plain language of section 924(e) establishes that the enhancement is mandatory. The circuit court joined the First and Tenth Circuits in holding that upon reasonable notice to the defendant and an opportunity to be heard, the section 924(e)

enhancement should automatically be applied by courts to qualifying defendants regardless of whether the government affirmatively seeks such an enhancement. *See* United States v. Johnson, 973 F.2d 857, 860 (10th Cir. 1992); United States v. Craveiro, 907 F.2d 260, 263 (1st Cir.), *cert. denied*, 498 U.S. 1015 (1990).

United States v. Gilley, 43 F.3d 1440 (11th Cir.), *cert. denied*, 515 U.S. 1127 (1995). The district court erred in allowing the defendant to collaterally attack four of the five predicate state convictions to preclude their use for enhancement under the Armed Career Criminal Act and in determining his criminal history score pursuant to USSG §4A1.2. The defendant was convicted of possession of a firearm by a convicted felon. The government appealed the district court's failure to sentence the defendant in accordance with the mandatory requirements of the Armed Career Criminal Act. The appellate court ruled that the Supreme Court's decision in Custis v. United States, 114 S. Ct. 1732 (1993), was dispositive of this issue. Custis precludes collateral attack on prior convictions that are counted for sentencing purposes under 18 U.S.C. § 924(e)(1), "with the sole exception of convictions obtained in violation of the rights of counsel." The sentence was vacated and remanded for resentencing.

McCarthy v. United States, 135 F.3d 754 (11th Cir. 1998). The district court did not err in finding that the defendant's prior Florida drug convictions qualified as predicate "serious drug offenses" under 18 U.S.C. § 924(e), so as to subject him to a mandatory minimum as an Armed Career Criminal. The defendant argued that, to determine whether his prior convictions were serious drug offenses, the court should have used the Florida guidelines' presumptive sentence range for each of the prior convictions, which was between three and one-half and four and one-half years, instead of the statutory maximum penalties. The court of appeals rejected the argument, finding that the district court properly considered the statutory maximum penalties.

United States v. Mellerson, 145 F.3d 1255 (11th Cir. 1998). The district court did not err in setting the defendant's base offense level at 34 under the Armed Career Criminal provision, §4B1.4(b)(3)(A), even though the defendant had not actually been convicted of a crime of violence while he possessed the firearms. The defendant did not contest that he committed the aggravated assault and armed burglary and that those were crimes of violence, but argued that because he had not be convicted of the offenses, they should not be considered in sentencing him. The court of appeals rejected this argument, agreeing instead with the Sixth and First Circuits, which have held that as long as the government proves by a preponderance of the evidence that a crime of violence was committed in connection with the firearms possession, §4B1.4(b)(3)(A) applies regardless of whether the connected crimes led to a conviction. *See* United States v. Rutledge, 33 F.3d 671, 673-74 (6th Cir. 1994); United States v. Gary, 74 F.3d 304, 316 (1st Cir. 1996). The court reasoned that the guideline states that 34 is the proper offense level "if the defendant used or possessed the firearm . . . in connection with a crime of violence"; the language does not mention a conviction.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Orozco, 121 F.3d 628 (11th Cir. 1997). The district court did not err in sentencing the defendant to the statutory minimum without applying the safety valve. When the defendant has more than one criminal history point, the safety valve is unavailable, even though the defendant's criminal history category is Category I.

Part D Supervised Release

§5D1.3 Conditions of Supervised Release

United States v. Romeo, 122 F.3d 941 (11th Cir. 1997). The district court erred in requiring the defendant's deportation as a condition of supervised release. The court of appeals held that 8 U.S.C. § 1229(a), the newly enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), eliminated the district court's jurisdiction to order judicial deportation pursuant to 18 U.S.C. § 3583(d). Previously, in United States v. Oboh, 92 F.3d 1082 (11th Cir. 1996) (*en banc*), the court had held that § 3583(d) authorized a district court to order the deportation of a defendant "subject to deportation" as a condition of supervised release. The IIRAIRA provides, however, that a hearing before an immigration judge is the exclusive procedure for determining whether an alien may be deported. In the wake of the statutory change, the court of appeals held that § 3583(d) authorizes a district court to order that a defendant be surrendered to the INS for deportation proceedings in accordance with the Immigration and Naturalization Act, but it does not authorize a court to order a defendant deported. Moreover, the court held that the statutory change is applicable to all pending cases.

United States v. Giraldo-Prado, 1998 WL 492703 (11th Cir. Aug. 19, 1998). The district court erred in ordering judicial deportation as a condition of supervised release. The defendant's case was pending at the time the court of appeals decided United States v. Romeo, in which the court held that the newly enacted immigration provision, 8 U.S.C. § 1229(a), eliminated the authority of the district courts to independently order deportation. Defendant's failure to object to the district court's lack of subject matter jurisdiction to order her deportation could not waive the issue, because subject matter jurisdiction is never waived.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Fuentes, 107 F.3d 1515 (11th Cir. 1997). The district court's order of restitution was improper in light of the court's acknowledgment that the defendant was indigent and not capable of making restitution in the full amount. The defendant was directed to pay restitution in the amount of $357,281. In determining whether to order restitution and the amount, the sentencing court should consider the amount of loss sustained by any victim as a result of the offense, the financial resources of the defendant, and the financial needs and earning ability of the defendant and the defendants' dependants. Examination of the transcript from the sentencing court revealed that both the prosecutor and the defense attorney agreed that the defendant was indigent and could not

pay restitution at the time of sentencing. The defense counsel argued that defendant's lack of job skills rendered him unlikely to be able to make full restitution during his period of supervised release. The government argued that the defendant's crimes showed that he possessed significant mechanical skills that would help him earn a legitimate living and pay restitution following his release. The appellate court held that although a sentencing court may order restitution even if the defendant is indigent at the time of sentencing, it may not order restitution in an amount that the defendant can never repay. The appellate court held that the district court abused its discretion in ignoring the testimony concerning the defendant's financial resources and the defendant's ability to pay after release.

United States v. Logal, 106 F.3d 1547 (11th Cir.), *cert. denied*, 118 S. Ct. 376 (1997). The district court did not err in voiding the defendant's restitution order because the defendant committed suicide prior to his incarceration. In keeping with Eleventh Circuit precedent, the court adhered to the general rule that the death of a defendant during the pendency of his direct appeal renders both his conviction and sentence, including any restitution order, *void ab initio*. United States v. Schumann, 861 F.2d 1234, 1236 (11th Cir. 1988). The interests of justice require that when death precludes the resolution of an appeal taken by the court, an accused not remain convicted without resolution of the merits of the appeal. The application of this rule to restitution is premised on the assumption that restitution is penal rather than compensatory in nature, despite the fact that a restitution order resembles a judgement for the benefit of the victim. Upholding the restitution order in this case would create a statutory discrepancy, because a restitution order requires an underlying conviction, while the doctrine of abatement ab initio returns a defendant to the position of never having been convicted.

United States v. McArthur, 108 F.3d 1350 (11th Cir. 1997). The district court erred in imposing restitution based on conduct of which the defendant was acquitted. The defendant was convicted of possessing a firearm in a federal facility and acquitted of the charge of assault with intent to commit murder, based on the shooting of a man he allegedly shot in self-defense. However, the district court ordered the defendant to pay restitution to cover medical costs of the individual he shot. The government contends that this is permissible based on the fact that sentencing judges may consider relevant conduct, even if the defendant is not found guilty beyond a reasonable doubt of that conduct. Relying on Hughey v. United States, 495 U.S. 411 (1990), the circuit court rejected this argument. In Hughey, the Supreme Court held that, pursuant to the Victim and Witness Protection Act (VWPA), 18 U.S.C. §§ 3579-3580, restitution orders cannot consider harms arising from conduct for which the defendant was acquitted. This is based on the statute's intent to punish only for the crime of conviction. A restitution order cannot be based on charges of which the defendant was acquitted, even if the charges relate to the crime of conviction. As the defendant was merely convicted of possessing the firearm, he cannot be held responsible for costs related to the shooting itself. The circuit court also rejected the Government's reliance on cases holding that a sentencing court may consider acquitted conduct stating that such cases are based on a sentencing court's powers, rather than the issue in this situation of the VWPA's scope as to authority to impose restitution.

§5E1.2 Fines for Individual Defendants

United States v. Mueller, 74 F.3d 1152 (11th Cir. 1996). The district court erred in ordering that if the defendant served his full prison sentence, his fine would be waived. On appeal, the court held that the sentencing guidelines, with limited exceptions, require the imposition of a fine in all cases. The court noted that there is no exception in the guidelines for the expiration of a fine based on the defendant's service of his full term of incarceration. As a result, the court of appeals could find no support for the district court's decision.

United States v. Price, 65 F.3d 903 (11th Cir. 1995), *cert. denied*, 516 U.S. 1017 (1996). In a matter of first impression, the Eleventh Circuit held that USSG §5E1.2, which imposes fines to pay for incarceration costs, is rationally related to the Sentencing Reform Act. The circuit court joined the Fifth Circuit in holding that "the uniform practice of fining criminals on the basis of their individualistic terms of imprisonment—an indicator of the actual harm each has inflicted upon society — is a rational means to assist the victims of crime collectively." United States v. Hagmann, 950 F.2d. 175, 187 (5th Cir. 1991), *cert. denied*, 506 U.S. 835 (1992). The defendants argued on appeal that the fines imposed pursuant to USSG §5E1.2 were excessive, violating the Eighth Amendment and due process under the Fifth Amendment because they were not rationally related to the purposes of the Sentencing Reform Act. The circuit courts have split on this issue. In United States v. Spiropoulos, 976 F.2d 155, 165-67 (3d Cir. 1992), the Third Circuit ruled that the Sentencing Reform Act did not authorize fines to cover costs of confinement. Every other circuit that has addressed the issue has rejected the Third Circuit's analysis and has adopted the Fifth Circuit's rationale in Hagmann. *See* United States v. Zakhor, 58 F.3d 464, 466 (9th Cir. 1995) (upholding cost of confinement fines); United States v. May, 52 F.3d 885, 891 (10th Cir. 1995) (finding guideline rationally related to legitimate government interest); United States v. Leonard, 37 F.3d 32, 39 (2d Cir. 1994) (citing Hagmann and holding §5E1.2(i) consistent with 18 U.S.C. § 3553(a); United States v. Turner, 998 F.2d 534, 538 (7th Cir. 1993) (holding that §5E1.2(I) is authorized by statute), *cert. denied*, 510 U.S. 1026 (1993). The Eleventh Circuit rejected the constitutional challenges and joined the majority of circuits in upholding §5E1.2(i).

Part G Implementing the Total Sentence of Imprisonment

§5G1.1 Sentencing on a Single Count of Conviction

Tramel v. United States Parole Commission, 100 F.3d 129 (11th Cir. 1996). The United States Parole Commission did not err in using the applicable Guidelines range, rather than the lower foreign sentence, as the baseline from which a downward departure would apply. After conviction in the Commonwealth of the Bahamas for possession of a dangerous drug with intent to supply, the defendant was sentenced to four years in prison. The defendant was transferred to the United States to serve his sentence pursuant to the Convention on the Transfer of Sentenced Persons, Council of Europe. The Parole Commission, which had jurisdiction under 18 U.S.C. § 4106A(b)(1)(A) to determine the appropriate release date and period of supervised release, determined that the defendant's entire four-year foreign sentence should be served, followed by supervised release for six months. This determination was made by viewing the defendant as if he had been convicted in a United States district court of a "similar offense" subject to the sentencing guidelines. The defendant's guideline range under the Sentencing Guidelines was determined to be 87 to 108 months, but, due to the harsh prison conditions endured by the defendant in the Bahamas, the parole examiner

determined that a downward departure from that range was warranted. However, the examiner rejected the defendant's request for a release prior to completion of the 48-month foreign sentence, finding that the lower foreign sentence was an adequate departure for the torture endured in the Bahamas. In situations in which the applicable guidelines range exceeds the foreign imposed sentence, the Commission is not required to ignore the guidelines range when determining whether a downward departure is warranted. Compare Thorpe v. United States Parole Commission, 902 F.2d 291 (5th Cir.) (upholding refusal to release prior to completion of foreign sentence, despite abuse in foreign prison), *cert. denied*, 498 U.S. 868 (1990), with Trevino-Casares v. United States Parole Commission, 992 F.2d 1068 (10th Cir. 1993) (ordering release prior to expiration of entire foreign sentence). While the Commission acknowledged that abuse at the hands of foreign officials is an appropriate basis for a downward departure, the circuit court found that the facts of the present case did not justify such a departure. The Parole Commission looked to USSG §5G1.1, which states: "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." "In the end, a foreign sentence does not under §5G1.1(a) displace the applicable guideline range; it is the sentence required by the guidelines, but not a substitute for the guideline range itself."

Part K Departures

§5K2.0 Grounds for Departure (Policy Statement)

United States v. Allen, 87 F.3d 1224 (11th Cir. 1996). Upon the Government's cross-appeal, the appellate court held that the defendant's responsibilities as primary (but not sole) caretaker of her 70-year-old father who suffers from Alzheimer's and Parkinson's diseases were not so extraordinary as to warrant a downward departure from the guidelines under USSG §5K2.0. The district court's five-level downward departure resulted in defendant being sentenced to one hour of imprisonment followed by 36 months of supervised release, instead of the guideline sentence of 12 to 18 months imprisonment. The appellate court agreed with the government that although the defendant's situation was difficult, the imposition of a prison sentence normally disrupts family relationships. *See* United States v. Mogel, 956 F.2d 1555 (11th Cir.), *cert. denied*, 506 U.S. 857 (1992) (rejecting downward departure where defendant had two minor children to support and a mother living with her). The appellate court noted that the sentence imposed must be within the Guidelines range unless "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." As stated in USSG §5H1.6, the Commission concluded that family circumstances do not ordinarily justify a downward departure. The appellate court acknowledged the district court's unique "feel for the case," but noted that unfettered discretion by district court judges would lead to sentencing disparity.

United States v. Hoffer, 129 F.3d 1196 (11th Cir. 1997). The district court erred in departing downward based on the defendant's civil forfeiture and his loss of his license to practice medicine. The defendant's agreement in plea bargain not to contest the government's subsequent civil forfeiture action seeking $50,000 from the defendant as proceeds of his illegal drug activities was a prohibited factor that could not be the basis for downward departure under the sentencing guidelines. The defendant's loss of his privilege to practice medicine as part of the plea agreement was not a basis for downward departure when sentencing him for federal drug offenses, where

defendant received a two-level sentence enhancement for using his special skills as a physician to facilitate commission of his crimes and for abusing the position of trust he held as a physician, and was able to commit his offenses because he had prescription writing authority.

United States v. Holland, 22 F.3d 1040 (11th Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). The district court's *sua sponte* downward departure was in error. The defendant appealed from a civil judgement entered for his participation in a conspiracy to deprive certain individuals of their civil rights in violation of 42 U.S.C. § 1985. He filed perjured in forma pauperis papers, claiming that he did not own anything of value. He was subsequently indicted and convicted of several counts of criminal perjury. The district court departed downward sua sponte because it determined that USSG §2J1.3 should not apply since the defendant's perjury stemmed from a civil proceeding. The circuit court held that the perjury statute, 18 U.S.C. § 1621, does not distinguish between perjury committed during civil or criminal proceedings. Accordingly, the defendant's offense conduct did not fall outside of the heartland of typical perjury offenses.

United States v. Miller, 78 F.3d 507 (11th Cir. 1996). The district court did not make sufficient factual findings in granting the defendant a downward departure, and therefore, the sentence was vacated and remanded. The district court granted the defendant a seven-level downward departure on the grounds that the Commission failed to adequately consider the impact of USSG §2S1.2(a) upon an attorney who derives knowledge of the source of the criminally derived property through a legitimate attorney-client relationship. *See* USSG §5K2.0. The government asserts that the defendant's status is taken into account through USSG §3B1.3 and, therefore, is adequately considered by the Commission. The defendant's argument rests on an exemption phrase amended into 18 U.S.C. § 1957(f)(1) stating "[T]he term `monetary transaction' . . . does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." As this amendment was never reflected in USSG §2S1.2, the appellant asserts that the Commission did not consider the effect that knowledge obtained via the attorney-client relationship can have on sentencing. The circuit court vacated the sentence due to the insufficient factual findings supporting the departure and remanded with instructions for the district court to explicitly make factual findings as to the circumstances warranting a departure, to state whether these circumstances are considered by the guidelines and are consistent with the guidelines goals, and if a departure is deemed appropriate, to state reasons justifying the extent of the departure.

United States v. Miller, 71 F.3d 813 (11th Cir.), *cert. denied*, 117 S. Ct. 123 (1996). The district court improperly departed downward by sentencing the defendant for conspiring to possess powder cocaine rather than crack, which was the substance delivered and charged in the indictment. The defendant argued that he was "trapped into supplying crack." The circuit court stated that the district court made no findings, and a careful review of the record does not reveal any mitigating circumstances justifying downward departure under USSG §5K2.0. Furthermore, the court rejected the defendant's entrapment argument and noted that sentencing entrapment is a defunct doctrine. *See* United States v. Williams, 954 F.2d 668, 673 (11th Cir. 1992); United States v. Markovic, 911 F.2d 613, 616 (11th Cir. 1990). The circuit court concluded that departure from the recommended sentencing range was neither reasonable nor consistent with the guidelines.

United States v. Searcy, 132 F.3d 1421 (11th Cir. 1998). The district court did not err in refusing to depart to reflect the theoretical sentence the defendant might have received had prosecution occurred in state court. The circuit court reasoned that allowing departure because the defendant could have been subjected to lower state penalties would undermine the goal of uniformity which Congress sought to ensure, as federal sentences would be dependent on the practice of the state within which the federal court sits.

United States v. Shenberg, 90 F.3d 438 (11th Cir. 1996). The circuit court affirmed the district court's upward departure pursuant to USSG §5K2.0. The defendant was an elected county judge, who engaged in kickback schemes involving his judicial authority. The district court departed upward five levels from the sentencing guideline range upon finding that the defendant's conduct was part of a systematic corruption of a governmental function causing loss of public confidence in government. The appellate court employed a three-prong test which included: (1) determining whether the Commission adequately considered the particular factors the district court relied on as the basis of its departure; (2) assuming it had not, determining whether the district court's reliance on those factors furthered the objectives of the guidelines; and (3) if those factors did further the objectives, determining the reasonableness of the district court's departure. In the instant case, the court found that the language of USSG §2C1.1 and the commentary thereto indicate that the guideline did not adequately account for such systematic corruption resulting in loss of public confidence in government. An upward departure from the guidelines range was therefore permissible if aggravating circumstances existed. *See* United States v. Alpert, 28 F.3d 1104, 1108 (11th Cir. 1994). The appellate court held that the loss of public confidence in government qualified as an aggravating circumstance, despite the government's lack of proof of local sentiment, because the guidelines do not specifically require a showing of actual public harm. The district court could properly "take judicial notice" of public reaction to the case when it contemplated the departure.

United States v. Tomono, 143 F.3d 1401 (11th Cir. 1998). The district court erred in granting a three-level downward departure for “cultural differences.” The defendant, a Japanese national, was convicted of illegally importing turtles and snakes. He moved for a departure, alleging that because of the cultural differences between the United States and Japan, he was unaware of the serious consequences of his actions, and that these differences constituted a factor not taken considered by the Sentencing Commission. In Japan, the animals were common, not endangered, and defendant would not have been arrested in Japan for keeping the animals. The court of appeals found these grounds insufficient to take the case out of the heartland. The fact that the animals may or may not be endangered is already considered in the guideline. By definition, imported wildlife comes from other countries. The guidelines that apply to illegal importation of wildlife necessarily contemplate that a portion of illegally imported wildlife will be imported by people from other countries, many of whom will have an imperfect understanding of United States customs law.

United States v. Willis, 139 F.3d 811 (11th Cir. 1998). The district court erred in departing downward in order to reconcile the disparity between federal and state sentences among codefendants. The court of appeals noted that permitting departure based on a codefendant’s sentence in state court would create system-wide disparities among federal sentences.

§5K2.5 Property Damage or Loss

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995), *cert. denied*, 516 U.S. 1166 (1996). The district court erred in departing upward based on the consequential financial damages to the victims beyond the amount they paid in advance fees to the defendant. The defendant was convicted of conspiracy to commit mail and wire fraud and wire fraud stemming from the operation of a loan brokerage firm. The defendants argued on appeal that consequential damages should not have been used as a basis for upward departure because those damages were adequately considered in establishing the defendant's guideline range. The circuit court agreed, ruling that the Sentencing Commission had expressly considered and rejected consequential damages as a factor in determining offense levels under the guidelines, except for government procurement and product substitution cases. The court noted that if the consequential damages in this case were "substantially in excess" of what ordinarily is involved in an advance fee scheme case, then a departure may have been warranted. The circuit court ruled that the consequential damages in this case were not substantially in excess of the typical fraud case and were not so "outside the heartland" for the crime of fraud as to warrant an upward departure.

§5K2.11 Lesser Harms (Policy Statement)

United States v. Rojas, 47 F.3d 1078 (11th Cir. 1995). The district court erred in granting a downward departure under USSG §5K2.11 to a defendant convicted of knowing possession of unregistered firearms, based upon his claims that he was transporting the weapons to Cuba in order to avoid the greater harm of the total destruction of a country and the annihilation of its citizens. On appeal, the government argued that 26 U.S.C. § 5861 seeks to prevent the harms associated with the defendant's conduct and that the defendant's subjective views of foreign policy may not serve as a basis for a sentence reduction. The appellate court agreed that section 5861 was intended to reach the harms connected with the defendant's conduct, and that the downward departure was inappropriate. The appellate court noted that the defendant's conduct did not fall into the "traditional" departure categories for §5K2.11: hunting, sport shooting and protecting the home. The circuit court further ruled that the Sentencing Guidelines clearly indicate that a defendant is not entitled to a downward departure because of a personal belief that the criminal action is furthering a greater political good.

§5K2.13 Diminished Capacity

United States v. Miller, 146 F.3d 1281 (11th Cir. 1998). The district court erred in departing downward for diminished mental capacity based on the defendant's impulse control disorder. The defendant pleaded guilty to transporting through a commercial computer service images depicting child pornography. He argued he was not a pedophile, but that he used the images of children in barter to get pornographic images he was interested in and that he had an impulse control disorder that contributed to his pornographic interest. The court of appeals rejected the departure on several grounds. First, the facts of the case did not remove it from the heartland in that, just because defendant was not a pedophile, the harm in the offense is sustaining a market for child pornography, of which defendant was guilty. Second, according to the expert testimony presented, impulse control disorders are not unusual among those who collect child pornography, so this aspect of defendant's personality does not separate him from other defendants. Finally, §5K1.13 requires that the diminished capacity be linked to the commission of the offense. It appeared that, at most, the defendant's impulse disorder was related to his viewing of adult pornography, and that his offense conduct was no more related to the impulse disorder than if he had robbed someone in order to use the proceeds to purchase adult pornography. The testimony failed to link the disorder to the offense, so no §5K2.13 departure was appropriate. Note: §5K2.13 has been amended, effective November 1, 1998.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release

United States v. Hurtado-Gonzalez, 74 F.3d 1147 (11th Cir.), *cert. denied*, 517 U.S. 1250 (1996). In considering an issue of first impression, the circuit court joined the Second Circuit in holding that in cases where the defendant's original sentence was for a preguidelines offense, the sentencing guidelines do not apply to sentencing following revocation of probation. *See* United States v. Vogel, 54 F.3d 49, 51 (2d Cir. 1995). The Second Circuit held that the plain language of 18 U.S.C. § 3565(a), which governs revocations of probation, controlled. The pertinent statutory language states that the court "may revoke the sentence of probation and impose any other sentence that was available . . . at the time of the initial sentencing." The defendant contended that this reasoning should not be applied because the guidelines goal of sentencing uniformity is better achieved by sentencing under the guidelines. The court rejected this argument, finding that uniformity is not a goal of the guidelines with respect to probation revocations; sentencing uniformity would not result from applying the guidelines in this case because the defendant is not a recent offender; and citing ex post facto concerns. "Finally, and more importantly, this court has held that defendants sentenced under the guidelines must, upon the revocation of their probation, be sentenced in accordance with the sentences available at the time they were originally sentenced." *See* United States v. Smith, 907 F.2d 133, 135 (11th Cir. 1990).

APPLICABLE GUIDELINES/EX POST FACTO

See United States v. Bailey, 123 F.3d 1381 (11th Cir. 1997), §1B1.11, p. 2.

United States v. Diaz, 26 F.3d 1533 (11th Cir. 1994), *cert. denied*, 513 U.S. 1155 (1995). The defendant argued that the district court violated the ex post facto clause by refusing to grant him an acceptance of responsibility reduction based on the amended §3E1.1 commentary, which took effect after he was convicted, but before he was sentenced. In rejecting this argument, the circuit court held that the commentary to §3E1.1 merely confirms this circuit's prior interpretation of §3E1.1; accordingly, it does not implicate ex post facto concerns.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Jones, 143 F.3d 1417 (11th Cir. 1998). The district court's error in failing to advise the defendant at his Rule 11 plea colloquy of the statutory mandatory minimum penalties was harmless where a signed, written plea agreement describing a mandatory minimum sentence is specifically referred to during the plea colloquy.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924(c)

See United States v. Bazemore, 138 F.3d 947 (11th Cir. 1998), §2K2.4, p. 13.

21 U.S.C. § 851

United States v. Brown, 47 F.3d 1075 (11th Cir. 1995). In deciding an issue of first impression in the Eleventh Circuit, the appellate court adopted the reasoning of four other circuits holding that 21 U.S.C. § 851 permits the government to seek an enhanced penalty (here, life imprisonment for a defendant guilty of a drug offense involving more than five kilograms of cocaine), where the offense was committed after "two or more convictions for felony drug offenses have become final." The defendant argued that the enhancement was inapplicable because his prior offenses had been state offenses, convicted upon the filing of informations, rather than upon indictments or waivers of indictment. The appellate court followed United States v. Espinosa, 827 F.2d 604 (9th Cir. 1987), *cert. denied*, 485 U.S. 968 (1988); United States v. Adams, 914 F.2d 1404 (10th Cir.), *cert. denied*, 498 U.S. 1015 (1990); United States v. Burrell, 963 F.2d 976 (7th Cir.), *cert. denied*, 506 U.S. 928 (1992); and United States v. Trevino-Rodriguez, 994 F.2d 533 (8th Cir. 1993), in holding that 21 U.S.C. § 851(a)(2) requires only that the "instant offense" be brought by indictment or waiver of indictment, and not the prior offenses.